Supreme Court, U.S.
FILED

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

SHEILA YARBRO GARRETT,
individually, and as surviving
parent of SHEILA NICOLE GARRETT
and next friend of
DONALD DONALDSON, a minor,

PETITIONERS,

VS.

HONORABLE A. C. GILLESS, in his
official capacity as Sheriff of
Shelby County; and
SHELBY COUNTY, TENNESSEE,

RESPONDENTS.

Petition For A Writ of Certiorari
To The United States Court of
Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Is there any degree of unconscionable conduct that will trigger an actionable substantive due process of law violation outside a Deshaney custodial setting for violent death and injury inflicted on wife and family by known violent deputy when his supervisors have actual knowledge of death threats yet permit this deputy to go armed off-duty?

II. Whether an Internal Affairs Bureau, which polices the Sheriff's Department, can elect to treat "domestic violence" complaints against deputies different from complaints of violence against members of public at large, without denying equal protection of law to spouses and families of homicidal deputies.

III. Whether a Sheriff's Department with actual knowledge that a violent deputy has threatened to murder his wife and family yet refused to act because the deputy was politically protected by the Sheriff himself had a 42 U.S.C. § 1983 "special relationship" with the wife.

LIST OF PARTIES

The parties to the proceedings below were:

a. Plaintiff Sheila Yarbro Garrett, individually, and as representative for wrongful death claim of Nikki Garrett, 4;

b. Donald Donaldson, Plaintiff;

c. Blue Cross/Blue Shield of Memphis holds significant subrogation rights for hospital bills paid;

d. A. C. Gilless, Defendant, in his official capacity as Sheriff of Shelby County, Tennessee;

e. Shelby County, Tennessee, Defendant.

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OPINIONS BELOW

The 2-1 opinion of the Sixth Circuit Court of Appeals was unreported, Judges Suhrheinrich and Kennedy, majority, and Presiding Judge Keith dissenting. A copy of opinion is Appendix "A." The opinion was filed January 17, 1995.

Appellees petitioned for rehearing en banc, which was denied March 1, 1995. A copy of the order is attached hereto as Appendix "B."

JURISDICTION

The opinion of the Sixth Circuit Court of Appeals was entered on January 17, 1995, and the jurisdiction of this Court to review the opinion of the Sixth Circuit is involved under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 42 U.S.C. § 1983: Civil Action for Deprivation of Rights: Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the parties injured.

2. Amendment XIV, United States Constitution, Section 1: Citizenship: Due Process: Equal Protection: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States

and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Prior to joining the Shelby County, Tennessee, Sheriff's Department in 1989, Gene Garrett had not demonstrated any violence or homicidal tendencies. He was 44 years old when he joined the department after getting involved in the campaign to elect Jack Owens, Sheriff. He was a truck mechanic, good-natured, backyard-barbecuing guy that didn't own a gun. He fell in with Frank Heflin who also worked in the Owens campaign and decided at this late age to go into law enforcement.

Garrett forged a GED and with the help of Heflin, Administrative Assistant to Sheriff Owens, who "pulled" his application, got into the training academy. Heflin then brought Garrett copies of the tests that would be given. Garrett, like Owens, was a Vietnam combat

veteran, and was tagged as one of the "Sheriff's boys," who could do no wrong. Garrett bragged that when the Sheriff "went on up" to higher political office that he (Garrett) and another favorite would go with him.

He graduated from academy in 1988 and was assigned to the Fugitive Squad for several months, when his personality began to change sharply: from a peaceful demeaned man, Garrett slowly became more violent, more domineering, and demanding. He became paranoid that people might recognize him or know where he lived. Then in January, 1989, Garrett was assigned to the Narcotics Unit, and his deterioration accelerated.

At this point in his life, Garrett and Sheila had a child of their own, Nikki, a bright 4-year older, and a stepson, Donald, Sheila's by a prior

marriage. Before going on the Narcotics Squad, he had never threatened or harmed any of them.

But when he went to Narcotics, a macho, door-kicking, headbusting squad that tackled the worst of the worst in million-or-so metropolitan Memphis, Garrett's personality underwent a radical change: he came home bragging of beating heads, slamming arrestees through closed car windows and the espirit de corps of the unit: "If one of us hits 'em, we all hit 'em, so no one will tell."

Sheila and the family now grew fearful; this was not the husband/father they had known and loved. Instead, Garrett was bragging of his violence and his political protection from the Sheriff. In fact, the Sheriff had had Garrett investigating the county Mayor to beat him politically and Garrett bragged that he

and Johnny Arnold, another deputy, "would go up with Owens."

Though she loved him, Sheila, fearful and intimidated, moved out of the house in March, 1989, to stay with her brother in another county. Garrett came to her and said he would do better if she would come back home. He promised to get counselling and work things out, but within 2-weeks he'd changed his mind: "I'm not the one who's crazy, you are." Then he announced that if Sheila ever left him again, he would kill her, Nikki and himself and put a .45 to Sheila's head. She then left and filed for divorce.

Tennessee statutes give the Sheriff the option of whether off- duty deputies can carry firearms or not. This is a policy trade-off: is it more important that off-duty deputies may be available to thwart crime than the fact that deputies

are human, sometimes get drunk, get into quarrels, or drink too much beer fishing and whip out the pistols they carry and shoot themselves in the foot. Shelby County, as permitted by statute, had adopted a written policy that its deputies, off-duty, could go armed, thinking it more important that they be ever ready to fight crime than to have them unarmed off-duty.

When she had separated from him, Sheila had obtained a restraining order, but it did not keep Garrett away. He would pull up in her driveway, knock on the door, follow her to work, regardless of her changing jobs, come to the babysitter's house when she was there, and called constantly on the phone to threaten her. He said he would kill Sheila, Nikki and then himself. He broke into her house and stole clothes, jewelry, and anything

of value. Sheila put a tape recorder on her phone and recorded Garrett saying, "You're a dead _____ bitch!"

She had called the Memphis Police Department on other occasions when her shrubbery and garden plants had been killed, doors beaten in, furniture, "stuff," clothes and food taken.

Memphis is a city of about 800,000; it holds most of the population of Shelby County. The Memphis Police Department and the Shelby County Sheriff's Department have concurrent jurisdiction over law enforcement within the city. Sometimes they have joint units to enforce the law, but otherwise operate side-by-side in the city.

When a deputy is accused of wrongdoing in the city, city policeman refer the complaint back to the Sheriff's Department, an arrangement of each

department being responsible for dealing with its own bad apples. An illustration of this occurred in Bartlett, a community in Shelby County, where Garrett had attacked Sheila and she had signed a warrant on him. The Bartlett police took the warrant but referred it back to the Sheriff's Department's IAB for any investigation.

On September 25, 1989, the violence escalated. Garrett drove by Sheila's house and shot out her front door glass and the rear window of her car. He son, Donnie, then 17, saw him. The city police were called and also the Internal Affairs Unit of the Sheriff's Department since a deputy was implicated. The city police deferred to the County IAB. "You know how it is." This was the policy, the understanding or accommodation between the two departments.

Frank Heflin, the Sheriff's Administrative Assistant, called Sheila and said that he (Heflin) and Sheriff Owens had discussed the matter and that "they would talk to Gene and that my car and my windows would be fixed if I didn't press charges and they would straighten Gene out." Thus, Sheila once more had her fate placed back in the hands of the Sheriff's Department. Unfortunately, Garrett was protected from on-high in the Sheriff's Department. Jon Hall, IAB, who came to the scene of the shooting pooh-poohed the whole deal. "It's just a domestic affair and there's nothing we can do." Hall would not listen to the recorded death threat. Nor would he take a statement from Donnie, 17, who had seen Garrett fire the shots. Hall, IAB, did nothing until 2 days after the ultimate slaughter a few months later when he wrote

a report purporting to have been an "investigation" of the September 25 event.

Hall did not mention that before any investigation of Garrett could commence, it would be necessary for her to come to headquarters to file a sworn, written complaint. In other words, Hall just brushed off the whole event.

However, others in the Department were concerned. Inspector Paudert was concerned about the violence toward Sheila. He was Garrett's unit commander. Sheila called him and he told her that it would be necessary for her to file a written complaint with Internal Affairs to get anything done.

Sheila went to Internal Affairs to report the death threat and shooting. She was met by Captain DuFours, who told her that IAB would not take the complaint since it was "domestic;" she tried to

file the complaint but could not so she went back to Unit Commander Paudert.

Paudert was himself alarmed at the most recent accusations and, not believing what Sheila had told him, went to Internal Affairs, where he was told the same thing: IAB's not going to get involved because it's only "domestic."

At the same time Sheila and her family were undergoing the horror of Garrett's personality change, the Sheriff's Department likewise knew of Garrett's violence and problems.

Terry Leggett, second in command of the Narcotics Unit, commenting on the violent nature of the detail, had suspected Garrett of drinking on the job when the latter had reported two phantom wrecks. Of course, he said, for a deputy to shoot into the home of an ordinary citizen would violate departmental policy

and would require an investigation by IAB, and certainly a death threat against an ordinary citizen would be a violation of departmental policy. Commenting on the violent nature of the Narcotics unit, Leggett said he would visit the hospital at least once a week, sometimes once a day for officers hurt in the line of duty.

The night of the slaughter, Garrett was driving a county-issued truck with a radio that monitored police frequencies. He carried two guns, Leggett confirmed, that were acceptable under departmental policy since he had "qualified" on both.

At the same time, Garrett was making a name for himself in IAB in other ways. A drug suspect, Ballard, had been arrested and beaten savagely by Narcotics unit officers all the while being recorded by the subject's inadvertently activated answering machine. Garrett was identified

as one of the officers in this shocking episode of police violence.

However, he was protected by Jack Owens, the sheriff. Capt. Pat Swain was in charge of the Garrett investigation. She said IAB knew of the violence and death threats toward Sheila and she herself wanted to "take Garrett down" by firing him. But because of Sheriff Owens, nothing would happen to Garrett. It was known he was "protected." Swain herself was demoted and taken off the Garrett investigation because she had gone about it too aggressively.

At trial, Captain Swain said it was general knowledge in Internal Affairs that Sheila was complaining that she was being harassed and threatened by Garrett and that he had threatened to kill her, but complaints of domestic violence against deputies were handled differently from

complaints of violence by deputies against ordinary citizens.

So at this time, Sheila Garrett found herself without any place to turn. City police told her she would have to go to Sheriff's Department IAB since her husband was a deputy, and IAB said they could do nothing because it was "domestic," and Garrett's growing violence was being covered over because of his "Vietnam" connection with the Sheriff, who had been given a copy of the tape of the prisoner being beaten.

Garrett, along with other officers involved, was placed on "non-enforcement status," which meant only that he was taken off his regular duties and worked the "script detail," which meant he was still armed on and off-duty. He kept the department-issued truck with police

radios. Basically nothing had happened to Garrett other than changing duties.

Captain Swain said that by the time the prisoner-beating tape, the September shooting into the house, and Sheila complaining about the threats there was concern in Internal Affairs, and she herself thought that Garrett should have been "taken down" or fired. Sheriff Owens though ordered Swain not to take statements from the officers involved and removed her for pressing the case too hard.

Another superior officer described Garrett at this time: "Has basic understanding of policies and procedures but fails to conform to policy... has been counseled twice... doesn't handle counseling well... his attitude was that he could do no wrong in Sheriff Jack

Owens' eyes and could get by with anything he wanted to do."

Now into February, 1990, nothing has improved. Sheila's waiting on her divorce to come up and Garrett's still on duty, though inactive due to the prisoner-beating. While on this status though, Garrett keeps his county vehicle and the right to carry both the .357 county-issued revolver and the .45 automatic with which he had also qualified. In other words, he could still run about with both guns wherever and whenever he wanted to go by the written policy of the department.

Owens' successor, Sheriff Gilless, confirmed the department would not get involved in domestic violence complaints: "...If it was a domestic situation, I think that we're talking about here, most likely we would not open an investigation at that point. We would await the outcome

of the court proceedings." Though a deputy shooting into the house of a private citizen would be regarded as a serious matter for investigation. If the victim was a spouse nothing would be done he said until the civil matter was concluded, though a deputy shooting into the home of a private citizen would be investigated as a criminal matter.

And it should be noted that not a one of the deputies recorded in the violent beating of the prisoner was ever charged, fired, or disciplined in any way by the Sheriff's Department. Garrett could have been reprimanded, suspended or fired or could have been required to go to the Employee Assistance Program as part of discipline.

Dr. John Bassett, a Sheriff Department psychologist employed to test applicants, had tested Garrett with the

MMPI and had found him within normal limits. There was no follow-up monitoring, and Bassett said duty on the stressful Narcotic Unit, including physical encounters with criminals and constant danger could cause a marked personality change within a matter of months.

Dr. Bassett, asked to assume Garrett had gone from an even-tempered family, who never discussed violence but after going on the Narcotics Unit had become quarrelsome, intolerant, bragging of violence, agreed that this pattern showed a significant change in Garrett's personality. Likewise, the phantom wrecks, the taped beating incident and death threats further indicated a personality change. Shooting in his wife's house further indicated a personality changing under stress, and all

these signals taken together pointed to a potentially dangerous conclusion. ". . .You are describing someone who is less predictable than any of us would want to be around."

Dr. Thomas Hickey, a psychologist testifying for the County from Garrett's personnel file said Garrett's problems arose from domestic stress not his work, but the doctor conceded he had never spoken with Sheila, Donnie or other witnesses to his deterioration. The jury obviously concluded that it was the stress and violence of his job that had caused Garrett's personality change, which in turn led to problems at home.

Sheila had put a tape recorder on her phone to record threats, etc., and had recorded Garrett saying "you're a dead _____!" prior to the September shooting, which was played for the jury.

Though both Sheila and Donnie could identify his voice, Hall, IAB, would not listen to the tape.

Coming now to February, 1990, matters had grown worse -- more threats and intimidation. And then Sheila went to church one night. Garrett, driving a county vehicle with a radio that could monitor police radio frequencies, charged in the small Baptist Church. He was .13 drunk and disrupted services. He was armed with both guns as he was by department policy legally entitled to carry.

The pastor stopped services and asked Garrett to leave. The pastor then went to the home of a Memphis policeman to ask what to do, and the officer told the pastor to call the Sheriff's Department, which he did.

Sheila, Nikki and Donnie went home. She called the Memphis Police Department, which came to her house, but Garrett was not to be found. After the police had left, Garrett drove back up in his undercover unit truck, ran across the lawn, kicked open the front door and chased Sheila and her children through the house. They were trapped in the kitchen by a deadbolted door. Donnie, the 17-year old, fought Garrett, only to be shot through the neck.

Garrett shot Sheila in the face, killed Nikki, and then shot himself all with the department-issued .357 pistol. He was also carrying a .45 automatic, as he was permitted, having "qualified" on the firing range with it.

The day following the tragedy, the IAB officer who had responded to the September shooting wrote a "report" to

make it appear that he had in fact investigated the matter without a signed complaint required in all cases. The day it was written Hall recommended that it be closed due to the death of Garrett.

Shortly thereafter Sheriff Owens killed himself, and A. C. Gilless was made Sheriff and later Defendant in the action.

The case was submitted to the jury on special verdict forms, and the jury specifically found denial of Due Process of Law and denial of Equal Protection of the Law.

REASONS FOR GRANTING THE WRIT

I. THE OPINION BELOW WOULD LIMIT LIABILITY ON THE PART OF THE STATE, REGARDLESS OF THE UNCONSCIONABILITY OF ITS CONDUCT, TO CUSTODIAL DESHANEY SETTINGS AND ELIMINATE THE "INCREASE THE VULNERABILITY" EXCEPTION WHEN KNOWN-VIOLENT AND POLITICALLY PROTECTED DEPUTY KILLS 4-YEAR OLD DAUGHTER AND WOUNDS WIFE AND STEP-SON.

II. THE DECISION OF THE SIXTH CIRCUIT AFFIRMS DISCRIMINATION AGAINST "DOMESTIC VIOLENCE" CASES OPPOSED TO VIOLENCE AGAINST GENERAL PUBLIC FOR INVESTIGATION AND DISCIPLINE OF POLICE OFFICERS.

III. THE SUPREME COURT SHOULD TAKE THIS OPPORTUNITY TO FLESHEN OUT ITS DESHANEY AND COLLINS OPINIONS TO SET STANDARDS OF WHAT CONSTITUTES ARBITRARY

GOVERNMENTAL ACTION SUFFICIENT TO LIFT STATE TORT CONDUCT TO A SUBSTANTIVE DPL DEPRIVATION.

IV. THE OPINION BELOW CONFLICTS WITH THREE OTHER CIRCUIT COURT OPINIONS:

1. WATSON V. CITY OF KANSAS CITY, 857 F.2D 690 (10TH CIR. 1988);

2. FREEMAN V. FERGUSON, 911 F.2D 52 (8TH CIR. 1980);

3. GIBSON V. CITY OF CHICAGO, 910 F.2D 1510 (7TH CIR. 1990).

I.

THE OPINION BELOW WOULD LIMIT LIABILITY ON THE PART OF THE STATE, REGARDLESS OF THE UNCONSCIONABILITY OF ITS CONDUCT, TO CUSTODIAL DESHANEY SETTINGS AND ELIMINATE THE "INCREASE THE VULNERABILITY" EXCEPTION WHEN KNOWN-VIOLENT AND POLITICALLY PROTECTED DEPUTY KILLS 4-YEAR OLD DAUGHTER AND WOUNDS WIFE AND STEP-SON.

DeShaney v. Winnebago County of Human Services, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), should not shield police misconduct and reckless indifference such as herein. The majority opinion of the Sixth Circuit, however, leaps into its shadow blindly: "The Court's decision in DeShaney. . . controls the outcome of this action. The Court stated that the affirmative duty to

protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitations it has imposed on his freedom to act on his behalf. . . through imprisonment, institutionalization, or other similar restraint of personal liberty. . ."

The Court ignores the further language of DeShaney: "While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." 109 S.Ct. 998, 1006.

The only reasonable interpretation of this language is that non-custodial relationships could give rise to liability if the state either 1) played a part in the creation or 2) did anything to make the victim more vulnerable.

In order to get to its conclusion, the majority had to ignore its own opinion in Nishiyama v. Dickson County, Tennessee, 814 F.2d 277 (6th Cir. 1987): "In our view, a person may be said to act in such a way as to trigger a Section 1983 claim does something unreasonable with disregard to a known risk or a risk so obvious that he must be assumed to have been aware of it, and of a magnitude such that it is highly probable that harm will follow." at 282.

Nor the Sixth Circuit did appreciate the factual propositions established:

1. Sheila was turned back to the Sheriff's Department Internal Affairs Bureau by other agencies and left at its mercies;

2. Garrett was personally protected by Sheriff Owens himself and IAB policy not to investigate "domestic" complaints;

3. The man would not have been legally armed off-duty had it not have been for the written policy of the Sheriff's Department;

4. Garrett was deteriorating under the stress of his job.

Thus, the jury could and did conclude that actions of Garrett's superiors increased the victims' vulnerability and enhanced their risk of violence.

But, DeShaney has been applied in such a manner in this opinion that shuts off all those considerations. A better analysis is found in L. W. v. Grubbs, 974 F.2d 119 (9th Cir. 1992): Custody is not a prerequisite to the "danger creation" basis for a third party harm claim.

Nishiyama turned on the "radius of harm" test: "This is not a case like Martinez (v. California, 444 U.S. 277, 100 S.Ct. 553 (1980)) where the parolee had

been out of police custody for several months and thus the identity of potential victims was difficult to define."

Moreover, the reckless indifference demonstrated in this case is far greater than in Nishiyama.

Here, we have direct and knowing cover-up of Garrett's violence by the Sheriff himself, who demoted the IAB captain because she wanted to fire Garrett; we have identified murder targets with recorded death threats; all other agencies turning Sheila to Sheriff's IAB for protection; we have Garrett driving to the murder scene in his county vehicle and committing the act with the county-issued gun, which he was allowed to carry off-duty because of county policy.

Armed with the information it had about Garrett's deterioration and risks presented to others, particularly Sheila,

the County nonetheless decided that Garrett not be fired or disarmed. This is deliberate indifference of the first order.

Viewing Nishiyama, Judge Keith dissented from the opinion precisely on this point: ". . . the majority is manufacturing a factual distinction between the two cases which does not exist. .. The defendants in this case were no less reckless in their failure to remove the instruments of death from Garrett, after they had been repeatedly notified of Garrett's threatening conduct toward his wife: breaking into her home; flattening her car tires; shooting out her automobile windows; and threatening to kill her."

The majority opinion, moreover, conflicts with the 8th Circuit's Freeman v. Ferguson, 911 F.2d 52 (1980): ". . .

there is a constitutional duty to protect an individual against private violence in a non-custodial setting if the county has taken affirmative action which increases the danger or vulnerability to violence, such violence beyond the level it would have been absent state action."

The jury concluded that the violence of the Narotics Unit brought out something violent and unreasonable in Garrett psyche; what he was doing made Garrett "bad."

Petitioners submit that DeShaney did not overrule Ferguson, yet the majority opinion herein would produce that effect.

This Sixth Circuit opinion likewise conflicts with a 7th Circuit holding: ". . .(The Plaintiff) has alleged a municipal 'policy' of inadequate procedures regarding the recovery of a deadly weapon and ammunition from officers placed on

medical leave as mentally unfit for duty. He also has alleged that the City's failure to promulgate adequate procedures to recover weapons and ammunition from officers it knew were mentally unfit for duty constituted deliberate indifference to the rights of the decedent and was the cause of the decedent's death in deprivation of his constitution rights . . . (Plaintiff) has pleaded sufficient facts to survive the defendants' motion to dismiss." Gibson v. City of Chicago, 910 F.2d 1510 (7th Circuit, 1990) at 1521.

At note 19, page 1521, the panel said, "Our disposition is quite compatible with DeShaney. . . the City is alleged to have played a part in both creating the danger (by training and arming officer Novit) and rendering the public more vulnerable to the danger (by allowing Novit to retain his weapon and ammunition

after it had otherwise stripped him of his authority.)"

The opinion herein would place reckless disregard and deliberate indifference on the shelf of dead theories and practically eliminate non-custodial substantive Due Process claims. This is an important and pervasive issue this Court should address.

II.

THE OPINIONS BELOW WOULD AFFIRM THE COUNTY'S POLICY AND PRACTICE OF TREATING "DOMESTIC" VIOLENCE CASES LESS SERIOUSLY THAN VIOLENCE COMMITTED BY DEPUTIES AGAINST THE GENERAL PUBLIC.

This opinion conflicts with Watson v. City of Kansas City, 857 F.2d 690, 694 (10th Cir. 1988): "Although there is no general constitutional right to police protection, the State may not discriminate in providing such protection."

Herein, Sheila was told by Inspector Paudert, Garrett's Commander, she would have to sign a written sworn complaint in order to initiate an Internal Affairs Bureau investigation. She wanted to report the prior violence and the death threat, which had been recorded.

First, IAB's Sgt. Hall, at the scene of the September shooting, did not even advise her of the complaint process. Paudert, however, realized the situation was getting dangerous and sent her to IAB, where Captain DuFour advised her that IAB would not take the complaint since it was only "domestic."

Second, Captain Swain, IAB, confirmed that domestic violence charges against deputies were handled different from violent acts against the public at large.

Third, Sheriff A. C. Gilless, Owen's successor confirmed the policy in his own testimony.

A wife and family are being threatened by a deputy-husband but are denied investigative services purely because of the martial relationship, which denies equal protection to these and other similarly situated persons.

Sheila's rights were constrained and liberty restricted because she had to undergo violence and threats without usual and ordinary police protection because of IAB's refusal to address "domestic" complaints.

Clearly Sheila and her children were in a clearly defined zone of danger at the hands of Garrett and because the IAB refused to act, to disarm him at least, that danger was enhanced.

Then because other agencies referred her back to Internal Affairs, which refused to act, her vulnerability was increased.

See also Bartalone v. County of Berrien, 643 F.Supp. 574, 577 (W.D. Mich. 1986) and Balistreri v. Pacifica Police Department, 901 F.2d 696 (1990), Lowers v. City of Streator, 627 F.Supp. 244 (N.D.

Ill. 1985); contra Hynson v. City of Chester, 731 F.Supp. 1236 (E.D. Pa. 1990).

Cellini v. City of Sterling Heights, _____ F.Supp. _____, 1994 WL 325395 (E.D. Mich. 1994), dealt with disparate treatment of domestic violence: "While it is beyond question that police need not treat different cases as the same, there still must be a rational relationship between the specific policy adopted and a legitimate government interest. . . (At Footnote 4. Gender-based classifications must bear a substantial relationship to an important governmental objective in order to pass muster under the equal protection clause. Craig v. Boren, 429 U.S. 190, 197, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976). Because Cellini's equal protection claims here are based on membership in a class of victims of domestic violence, rather than on gender, they are evaluated under the

rational relationship standard. . . though, that most domestic assault is committed by a male partner against a female partner. . ."

Clearly there is no rational relationship between IAB's policy on domestic violence complaints and any important governmental function yet the opinion below ratifies this unconstitutional practice.

Domestic violence is a national problem and police departments across this land need a clear guidance from the Supreme Court to set policies and practice in dealing with complaints of domestic violence.

III.

THE COURT SHOULD TAKE THIS OPPORTUNITY TO FLESHEN OUT ITS DESHANEY AND COLLINS OPINIONS TO SET STANDARDS OF WHAT CONSTITUTES ARBITRARY GOVERNMENT ACTION SUFFICIENT TO LIFT STATE TORT CONDUCT TO A SUBSTANTIVE DPL DEPRIVATION.

When Sheila went to IAB to file a complaint and was turned away, the Sheriff's Administrative Assistant, Frank Heflin, called and told her if she would ease off that prosecution, that Heflin and the Sheriff would "straighten Garrett out." Whether the Administrative Assistant actually had the authority to make such a proposition is immaterial since Sheila would have known that Heflin's real function was less than his title.

But here is a nexus for another "special relationship" created between Sheila and Sheriff Owens, who at the same time was preventing her from following up on a complaint and killing the IAB investigation of prior violent conduct by demoting Captain Swain.

Petitioners recognize the Court is reluctant to wade into substantive Due Process claims as set forth in Collins v. City of Harker Heights, TX, _____ U.S. _____, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992): "As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this unchartered area are scarce and open-ended. . . The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." at 1068.

Collins involved a city failing to warn a sewer worker of the possibility of asphyxiation in a manhole while unstopping a sewer line. The Court held that though this may be a state tort claim, it did not rise to a DPL deprivation.

Collins did, however, reaffirm that arbitrary or conscience-shocking behavior may yet be actionable under 42 U.S.C. § 1983 DPL standards, and at 1070 the Court appeared to define the test:

> Our refusal to characterize the city's alleged omission in this case as arbitrary in a constitutional sense rests on the presumption that the administration of Government programs is based on a rational decision making process that takes account of competing social, political, and economic forces. . . Decisions concerning the allocation of resources to individual programs, such as sewer maintenance, and to particular aspects of those programs, such as training and compensation of employees, involve a host of policy choices

> that must be made by locally elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country. The Due Process Clause is not a guarantee against incorrect or ill-advised personnel decisions. . .

One is hard pressed to find any rational decision-making process on the part of Garrett's superiors that takes into account competing social, political and economic forces. Nor could one imagine the harboring of a dangerous deputy is an allocation of resources issue. The truth of the matter is that the "Good 'Ol Boy" network doing its thing.

And notwithstanding the Court's reluctance to get involved in substantive Due Process of Law claims, the case presents a rare opportunity for the Court to declare what <u>is</u> arbitrary government

action and prevent future government abuse.

IV.

THE OPINION BELOW CONFLICTS WITH THREE OTHER CIRCUIT COURT OPINIONS:

1. WATSON V. CITY OF KANSAS CITY, 857 F.2D 690 (10TH CIR. 1988);

2. FREEMAN V. FERGUSON, 911 F.2D 52 (8TH CIR. 1980);

3. GIBSON V. CITY OF CHICAGO, 910 F.2D 1510 (7TH CIR. 1990).

As stated in the foregoing analysis, the present opinion conflicts with the three cases listed above and this Court should grant the petition to secure uniformity of decisions between the Circuits.

CONCLUSIONS

For the reasons noted, resolution by this Court of the questions presented is both appropriate and urgent, and the writ of certiorari should issue.

This the 10th day of April, 1995.

/s/ Michael W. Whitaker
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APPENDIX "A"

NOT FOR PUBLICATION

NO. 93-6197

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SHEILA YARBRO GARRETT, et al.,

Plaintiffs-Appellees,

v.

A. C. GILLESS, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

_____/

BEFORE: KEITH, KENNEDY AND SUHRHEINRICH, Circuit Judges.

PER CURIAM. Defendants appeal from the entry of judgment against them in this 42 U.S.C. § 1983 action arising out of the alleged failure of defendants Shelby County and the Shelby County Sheriff Department to provide police protection to a victim of domestic violence and her children. The majority concludes that no constitutional

violation occurred, and therefore REVERSE the judgment entered against defendants.

I.

The relevant facts adduced at trial are presented below. Sheila Yarbro Garrett ("Mrs. Garrett" or "Sheila") and Clyde Garrett ("Garrett") were married in 1984. In 1987, Garrett underwent training and was commissioned as a deputy sheriff by the Shelby County Sheriff. Towards the end of their marriage, the Garretts experienced marital difficulties, and Garrett became increasingly violent. In July 1989, Sheila filed for divorce and obtained a restraining order against Garrett. She retained custody of their daughter, Nikki, as well as her two sons from a prior marriage. After their separation in 1989, Garrett made repeated threats to kill his wife and their daughter. Sheila reported several incidents of abuse to the police. In each case, an Internal

Affairs Bureau (IAB) investigation file was opened, but the IAB was not able to pursue an investigation because Sheila declined to file charges against Garrett. On February 11, 1990, Garrett went to the family's residence. He entered the house with guns in both hands, one of which was the service revolver issued by the Sheriff Department. He shot Sheila in the face, and her son Donald in the neck before killing his daughter himself. Sheila and her son Donald sought damages for violations of their federal constitutional rights pursuant to § 1983 claiming that defendants violated plaintiffs' due process rights and their right to equal protection under the law.[1]

II.

Plaintiffs begin their constitutional argument with the faulty assumption that law

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[1]Sheila also sought an award on behalf of her deceased daughter.

enforcement officers have a constitutional duty to protect private citizens from acts of violence committed by other private citizens. As noted by the Supreme Court, because the Constitution is a charter of negative liberties, it does not impose an affirmative obligation on the federal government or a state to provide certain minimal levels of safety and security, absent a special relationship between the private citizen and the government. DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 195-97 (1989). Rather, the Due Process Clause simply forbids the government from depriving individuals of life, liberty, or property without due process of law. Id.

The Supreme Court's decision in DeShaney, supra, controls the outcome of this action. The Court stated that "[t]he affirmative duty to protect arises not from the State's knowledge of the individual's

predicament or from its expressions of intent to help him, but from the limitations which it has imposed on his freedom to act on his own behalf. . . . through imprisonment, institutionalization, or other similar restraint of personal liberty . . . ." Id. At 200 (internal citations omitted). Thus, even in situations where the defendant may be aware of danger to an individual, as in the case before us, the defendant is under no constitutional duty to protect the individual absent the special relationship; "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." Id. at 197. As DeShaney establishes, defendants' mere awareness of potential danger to plaintiffs, without more, is not sufficient to create a constitutional duty.

Plaintiffs' reliance on Nishiyama v. Dickson County, 814 F.2d 277 (6th Cir. 1987)

is misplaced. The crucial distinction in Nishiyama was that the perpetrator, a state prisoner, was furnished with a sheriff's police car to run errands. Thus, the defendants in Nishiyama took affirmative action to provide the perpetrator with the opportunity and the freedom to commit the crime. Here, by contrast, Garrett was not authorized to use the police truck for personal business, and furthermore, had other modes of transportation to get to Mrs. Garrett's house. We are not persuaded by plaintiffs' attempt to circumvent DeShaney by arguing that a special relationship somehow existed because the Department furnished the "weapon of destruction," the truck Garrett drove on February 11, 1990, and adopted a policy permitting drunken off-duty officers to carry their firearms.

Here, there simply was no showing that defendants' inaction was a proximate cause of

plaintiffs' injuries, especially in light of the fact that Garrett had two guns with him at the house, not just the gun issued by the Sheriff. Even if defendants had confiscated the weapon they issued, Garrett still possessed a gun and thus still could have acted. Further, Ms. Garrett was not at any time in the custody or control of defendants. Thus, there is nothing in the record to establish a special relationship between defendants and Ms. Garrett, and therefore no constitutional duty can be imposed on defendants. Therefore, we hold that because defendants were not under a duty to act, their "inaction" did not constitute a constitutional violation.

Plaintiffs' claim that defendants' alleged custom or policy to treat victims of domestic violence less seriously than other crime victims also fails. Plaintiffs first must establish an affirmative constitutional

duty has been imposed on the defendants. The custom or policy does not create this constitutional duty; its relevance is in proving, once a duty is established, that a state's action or inaction was grossly negligent or deliberately indifferent to the plaintiffs' constitutional rights. Liability attaches only if a plaintiff can establish that her injuries were the result of an unconstitutional policy or custom. See Oklahoma City v. Tuttle, 471 U.S. 808, 817, reh'g denied, 473 U.S. 925 (1985); Monell v. Department of Social Servs., 436 U.S. 658, 691 (1978). As discussed above, defendants were not under a constitutional duty to protect plaintiffs from violent acts committed by a private actor. In addition, we cannot conclude, based on the record before us, that defendants had a policy to permit off-duty officers to carry weapons to commit spousal abuse and other acts of

violence. At best, defendants' policy allowing off-duty officers to carry their weapons amounts to negligence, which is insufficient to impose liability. See, e.g., Lewellen v. Metropolitan Gov't of Nashville, 34 F.3d 345 (6th Cir.), reh'g en banc, denied, 1994 U.S. App. Lexis 28696 (6th Cir. Oct. 12, 1994). The district court therefore erred in allowing this issue to reach the jury.

III.

For the reasons provided above, the majority finds that defendants did not violate plaintiffs' constitutional rights and therefore REVERSE AND REMAND with instructions to dismiss the case. Because no constitutional violation exists, it is not necessary to address the other issues defendants raise on appeal.

Judge Keith would dissent from the view presented above.

Damon J. Keith, Circuit Judge, dissenting. I disagree with the majority opinion that Nishiyama is not controlling. See Nishiyama v. Dickson County, 814 F.2d 277 (6th Cir. 1987). The majority finds a "crucial" distinction between Nishiyama and the case at bar. Slop op. at ____. In Nishiyama, the perpetrator, a state prisoner, was furnished with a sheriff's patrol car to run errands, and used that patrol car while murdering Kathy Nishiyama. The majority contrasts the Nishiyama scenario with what took place in the instant case. The Sheriff's Department furnished Garrett with a police truck and a revolver, and, though not authorized to do so, he used the vehicle and his service revolver to murder his daughter and critically wound his wife and stepson. I fail to see the difference.

In Nishiyama, this Court held the defendants liable because they were

recklessly indifferent by continuing to allow prison trusties the use of patrol cars to run errands, even after the defendants had been informed some trusties had criminally abused this privilege. Id. at 281. Garrett's superiors likewise had been notified on several occasions that he had threatened to kill his wife; broke into her home; shot out her automobile window; and, flattened her tires, all while in possession of his service revolver and police truck.

The majority's distinction between this case and Nishiyama appears to turn on whether the actor received affirmative assistance from the defendants in order to commit the underlying offense. The majority opinion distinguishes Nishiyama on the basis that the defendants there "took affirmative action to provide the perpetrator with the opportunity and the freedom to commit the crime," slip op. at ___, therefore liability attaches to

defendants. In the case at bar, however, the majority concludes Garrett did not receive affirmative assistance from the defendants, therefore no liability attaches. Slip op. at ___.

The problem I have with the majority analysis is that the majority is manufacturing a factual distinction between the two cases which does not exist. The trustie in Nishiyama received the instrument of death, the patrol car, from the defendants. Garrett received his instruments of death, the police truck and his service revolver, from the defendants. In Nishiyama, the defendants were on notice that the trusties were abusing their use of the police vehicles and they continued to allow the trusties use of the police vehicles. Similarly, the defendants in the instant case were on notice that Garrett was becoming increasingly more violent toward his wife.

This Court found in Nishiyama that the defendants acted with "reckless indifference" by failing to stop the practice of providing trusties with access to patrol cars in the face of abuse. Nishiyama, 814 F.2d at 282-83. The defendants in this case were no less reckless in their failure to remove the instruments of death from Garrett, after they had been repeatedly notified of Garrett's threatening conduct toward his wife: breaking into her home; flattening her car tires; shooting out her automobile windows; and threatening to kill her.

For the foregoing reasons, I respectfully dissent.

APPENDIX "B"

NO. 93-6197

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SHEILA YARBRO GARRETT, INDIVIDUALLY AND AS SURVIVING PARENT OF SHEILA NICOLE GARRETT, AND NEXT FRIEND OF DONALD DONALDSON, A MINOR,	)	
Plaintiffs-Appellees,	)	
v.	)	ORDER
A. C. GILLESS, SHELBY COUNTY SHERIFF; SHELBY COUNTY, TENNESSEE,	)	
Defendants-Appellants.	)	

BEFORE: KEITH, KENNEDY, and SUHRHEINRICH, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the

petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Keith would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

LEONARD GREEN, CLERK

Supreme Court, U.S.
FILED
MAY 23 1995
OFFICE OF THE CLERK

No. 94-1752

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

SHEILA YARBRO GARRETT, INDIVIDUALLY AND AS SURVIVING PARENT OF SHEILA NICOLE GARRETT AND NEXT FRIEND OF DONALD DONALDSON, A MINOR,
Petitioners,

v.

A.C. GILLESS, IN HIS OFFICIAL CAPACITY OF SHERIFF OF SHELBY COUNTY, AND SHELBY COUNTY, TENNESSEE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit properly ruled that the failure of a sheriff to protect a spouse and child from harm from an off-duty deputy sheriff did not state a constitutional violation of either substantive due process or equal protection rights under the Fourteenth Amendment to the Constitution.

LIST OF PARTIES

Petitioner, Sheila Garrett, is an individual. She was also acting as the personal representative and surviving parent of her daughter, Sheila Nicole Garrett, a minor, and as next friend for her then minor son, Donald Donaldson.*

Respondent, A.C. Gilless, is the duly elected Sheriff of Shelby County, Tennessee. He was sued in his official capacity only.

Respondent, Shelby County, Tennessee, is a political subdivision of the State of Tennessee.

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* The Petitioners listed Blue Cross/Blue Shield as a party based upon its purported subrogation rights. That entity, however, was never served, was never named in the proceedings and never made an appearance before any court. Respondents do not believe that it was a party to the proceedings.

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No. 94-1752

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SHEILA YARBRO GARRETT, INDIVIDUALLY AND AS SURVIVING PARENT OF SHEILA NICOLE GARRETT AND NEXT FRIEND OF DONALD DONALDSON, A MINOR,
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v.

A.C. GILLESS, IN HIS OFFICIAL CAPACITY OF SHERIFF OF SHELBY COUNTY, AND SHELBY COUNTY, TENNESSEE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT:

The respondents, Sheriff A.C. Gilless and Shelby County, Tennessee, respectfully request that this Court deny the Petition for a Writ of Certiorari submitted by the petitioners, Sheila Yarbro Garrett and Donald Donaldson ("The Garretts").

OPINIONS BELOW

This case was brought in the United States District Court for the Western District of Tennessee pursuant to 42 U.S.C. 1983. A jury returned a verdict for the Garretts, and the Sheriff and County appealed to the United States Court of Appeals for the Sixth Circuit.

The Court of Appeals, in a two to one decision, reversed the jury verdict and remanded the case for an order of dismissal. The appeals court's decision is unreported and is attached to the Petition for a Writ of Certiorari (A. A1-A13).

Following the Sixth Circuit's opinion, the Garretts moved for a rehearing *en banc*. That was denied, as was a rehearing, in an unreported order. The Court's order is attached to the Petition for a Writ of Certiorari (A. A14-A15).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The jurisdiction of the Court of Appeals was invoked pursuant to 28 U.S.C. § 1291 as an appeal as a matter of right from a Final Judgment on a Jury Verdict in the District Court awarding damages to the Garretts.

The jurisdiction of the United States District Court was invoked pursuant to 28 U.S.C. §§ 1331 and 1343, and 42 U.S.C. § 1983, for alleged violations of the Garretts' rights under the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Gene Garrett ("Gene") had been a deputy sheriff in the Shelby County Sheriff's Department since 1987. In 1989 he

was assigned to the Sheriff's narcotics unit and supplied with a light truck for use while on duty, as well as a service revolver. He also owned a personal gun.

Gene and his wife, Sheila Yarbro Garrett ("Sheila"), were estranged and separated by 1989. Over a period of months Sheila had called the Memphis Police Department for several incidents involving Gene, including a threat on her life and on the life of their daughter, Sheila Nicole Garrett ("Nikki"). The Sheriff's Internal Affairs Bureau ("I.A.B.") was notified of these incidents by the police. Except for an incident in Bartlett, Tennessee, where each filed assault charges against the other,[1] Sheila refused to file charges against Gene with either the Memphis Police Department or the I.A.B. The I.A.B. opened files for each of the incidents, but could take no further action because of Sheila's refusal to file charges.

On the night of Sunday, February 11, 1990, an off-duty Gene Garrett drove the Sheriff's truck to his estranged wife's house and broke down the door. With his personal gun in one hand and his service revolver in the other, he shot Sheila in the face, shot Donald Donaldson, Sheila's son and Gene's step son, in the neck, and shot and killed his daughter Nikki, before killing himself.

Sheila and Donald Donaldson brought an action for damages in the United States District Court for the Western District of Tennessee, pursuant to 42 U.S.C. § 1983. After a trial, the Court submitted the case to a jury on the defendants' violations of the plaintiffs' Fourteenth Amendment right to substantive due process and equal protection under the law. The jury returned a verdict for the Garretts. The Sheriff and County appealed to the United States Court of Appeals for the Sixth Circuit.

The Sixth Circuit, in a two to one unreported decision, reversed the jury verdict and remanded the matter to the District

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[1] Gene was free on bail on this charge, on February 11, 1990.

Court with instructions to dismiss the case. The appeals court held there was no special relationship between the Sheriff or the County and the Garretts, hence, under *DeShaney* v. *Winnebago County Dept. of Social Services*, 489 U.S. 189, 195-97 (1989), a substantive due process violation was not shown. The Sixth Circuit further distinguished its holding in *Nishiyama* v. *Dickson County, Tenn.*, 814 F.2d 277 (6th Cir. 1987), which the trial court relied upon in submitting the Garretts' case to the jury, by noting that the *Nishiyama* defendants "took affirmative action to provide the perpetrator with the opportunity and the freedom to commit the crime" (App. to Petition for Writ of Cert. at A6), which was not the situation in the matter *sub judice*. As to the equal protection claim, the Court held that a plaintiff must, in the first instance, show that there was an affirmative constitutional duty imposed upon the defendants to act. The "defendants [in this matter] were not under a constitutional duty to protect plaintiffs from violent acts committed by a private actor" (App. to Pet. for Writ of Cert. at A8), hence, no equal protection rights were violated.

The Garretts filed a petition for a rehearing, *en banc*. That was denied, as was a rehearing. A Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Sixth Circuit was filed and is presently before this Court.

REASONS FOR DENYING THE WRIT

I.

THIS CASE PRESENTS NO ISSUE APPROPRIATE FOR THE COURT'S EXERCISE OF ITS DISCRETIONARY JURISDICTION. IT MERELY CHALLENGES THE SIXTH CIRCUIT'S INTERPRETATION OF THE *DeSHANEY* AND *NISHIYAMA* CASES.

The Garretts' petition fails to satisfy the traditional criteria applied by this Court in determining whether to grant a Writ of Certiorari. The Sixth Circuit properly applied *DeShaney*, and clearly distinguished, on a factual basis, the holding in *Nishiyama*. The Sixth Circuit's ruling was fact specific and hence, would present little precedential value.

The Garretts' first argument is that the Sixth Circuit's decision limits substantive due process violations to only custodial situations under *DeShaney*. They argue that the court should have applied an "increase the vulnerability" standard set out in *Freeman* v. *Ferguson*, 911 F.2d 52, 55 (8th Cir. 1990).[2]

Various courts have found substantive due process violations in non-custodial situations. The hallmark of those cases is a finding of some affirmative action on the part of the state actor that adversely affected the plaintiff. In the case at bar, there was no action by the Sheriff or County that increased the Garretts' vulnerability; hence, there was no substantive due process violation under the standard the Garretts propose.

DeShaney v. *Winnebago Soc. Serv.*, *supra* at 197-98, in essence held that the Constitution is a charter of negative liberties — affirmative duties ordinarily do not exist under the due process clause. The Court specifically rejected the argu-

[2] This concept has been applied by many other courts under various names.

ment that someone, once in custody, created a continuing affirmative duty upon the State to protect that person against harm from private actors. Rather, the Court held that

> [t]he affirmative duty to protect arises not from the individual's predicament or from [the State's] expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.

Id. at 200, *DeShaney*, indicates that absent some affirmative action to limit another's freedom to act, no sustantive due process rights are triggered. Those courts finding substantive due process violations in non-custodial settings, limit their decisions only to situations where a "special relationship" was created. *See, Balistreri* v. *Pacifica Police Dept.*, 855 F.2d 1421, 1424, n.4 (9th Cir. 1988) for collected cases. Those cases trigger constitutional scrutiny only when the State, *by its actions*, created a danger that threatened the plaintiff's life or liberty. *See, Bowers* v. *DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) ("If the state puts a man in a position of danger from private persons and then fails to protect him . . . it is as much an active tortfeasor as if it had thrown him into a snake pit."). Thus, in *Freeman* v. *Ferguson*, *supra* at 55, the Court held that it might allow a substantive due process claim in a non-custodial setting "if the state has taken affirmative action which increases the individual's danger of, or vulnerability to, such violence beyond the level it would have been at absent state action." *See also, Russell* v. *Steck*, 851 F.Supp. 859, 864 (N.D. Ohio 1994).

Gibson v. *City of Chicago*, 910 F.2d 1422 (7th Cir. 1990) is consistent with the above analysis. Chicago actively sought to limit the police officer's ability to officially act by finding him mentally unfit for duty and ordering him to turn in his

gun and ammunition. Once having undertaken a limitation of the police officer's unhampered freedom, Chicago was under an obligation to follow through. It failed to do so and the decedent was shot by the officer while off-duty with the gun and ammunition Chicago should have collected from him. The State actor thus undertook some affirmative action and then failed to follow through with its affirmative duties which, in turn, increased the plaintiff's vulnerability.

The Garretts present a list of facts claiming those were the requisite affirmative action of the defendants that took the matter outside *DeShaney*. Pet. for Writ of Cert. at 29-30. The Garretts' argument misapplies the *DeShaney* analysis by focusing on actions of the defendants. *See, DeShaney* v. *Winnebago Soc. Serv., supra*, dissent of Justice Brennan, at 204-05. The question the Sixth Circuit addressed was whether, in the first instance, there was a constitutional duty on the part of the Sheriff or County to protect the Garretts. It found there was no such constitutional duty. The Court then noted that, because neither the Sheriff nor County acted to protect the Garretts, there was no substantive due process claim presented. Pet. for Writ of Cert. App. at A6-A7. The gravamen of the Garretts' claim was, after all, that the Sheriff *did nothing* to protect them.

On the same basis, the Appeals Court correctly distinguished *Nishiyama* v. *Dickson County, Tenn., supra*. In *Nishiyama*, the defendants set in motion a series of events that gave the trusty prisoner both the means and "freedom to commit the crime." *Id.* at 281. The plaintiff was put in a unique "position of danger" by the defendants allowing the trusty his freedom and unsupervised use of the patrol car. *See, Cornelius* v. *Town of Highland Lake*, 880 F.2d 348 (11th Cir.), *cert. denied*, 494 U.S. 1006 (1990). There was affirmative action on the part of the defendants that increased the vulnerability of the plaintiff's decedent. There was no such affirmative action on the part of the defendants in the case *sub judice* — Gene was not

given his freedom or the means to commit the shootings by the Sheriff or the County.

The Garretts point to the fact that Gene used a Sheriff's vehicle to get to his estranged wife's house and his service revolver to commit the shootings. But, as the Sixth Circuit noted at A6-A7, Gene had other means of transportation available and his personal gun was in his other hand. Nothing the defendants did set in motion any action that led to the shootings. The defendants simply did not give Gene the means or the freedom to commit the shootings, he had those already. It would be sheer speculation to say that if Gene did not have the truck or a service revolver, the harm to the plaintiffs would not have occurred.

As Chief Justice Rehnquist noted in *DeShaney, supra* at 202-03, the facts before the Court are tragic, but the harm was not inflicted by the defendants and they should not be held liable because of the natural impulse to compensate the victims. The result may seem harsh, especially when others suffer while the government stands idly by, but a common law tort claim is not sufficient to state a constitutional violation under the Fourteenth Amendment.

The decision of the Sixth Circuit was correct. There was no constitutional duty requiring the defendants to protect the Garretts. Moreover, the proof failed to show any affirmative action by the defendants that placed the Garretts in a position of increased vulnerability. This case is not the proper vehicle to define the parameters of substantive due process violations in a non-custodial context, especially when there is nothing dictating an affirmative duty to protect on the part of the State. The defendants did nothing to create the danger from the private actor, nor did they do anything that enhanced the risk of harm to the plaintiffs.

II.

BASED UPON THE FACTS, THE SIXTH CIRCUIT'S HOLDING THAT THE GARRETTS' EQUAL PROTECTION RIGHTS WERE NOT VIOLATED WAS CORRECT.

The Garretts' second argument overdramatizes the appeals court's holding on the equal protection claim. The holding is not a tacit approval of domestic violence, but rather an application of time tested rules for finding constitutional violations. The decision neither condones nor encourages domestic violence — it simply recognizes the limitations of the Constitution.

The Garretts' argument rests upon a faulty assumption — that the defendants were under a constitutional duty to protect the plaintiffs from private violence. If the defendants were not under a constitutional duty to protect the Garretts, and if they did not act to protect them, their inaction should not trigger a constitutional inquiry. *See*, App. A7-A9.

The Garretts' argument suffers from the very thing the Court in *Collins* v. *City of Harker Heights, Tex.*, 112 S.Ct. 1061, 1066 (1992) warned against — an assumption that a constitutional violation had been proved before focusing on the question of municipal liability. There was no constitutional violation in the first instance; hence, there could be no municipal liability. Absent a constitutional violation, liability issues are moot.

Watson v. *Kansas City, Kan.*, 857 F.2d 690, 694 (10th Cir. 1988) follows this reasoning. The Court noted there was no constitutional right to police protection; but, *if such protection was provided*, the police could not discriminate in providing it. Constitutional scrutiny is triggered only when there was a failure to fulfill an affirmative duty to act — not a failure to act when there was no constitutional duty to act.

The most often cited standard for equal protection claims in domestic abuse cases is set out in *Hynson* v. *City of Chester*, 864 F.2d 1026, 1031 (3d Cir. 1988). Relying upon *Watson*, *supra*, the court noted that to survive a summary judgment motion

> a plaintiff must proffer sufficient evidence that would allow a reasonable jury to infer that it is the policy or custom of the police to provide less protection to victims of domestic violence than to other victims of violence, that discrimination against the women was a motivating factor, and that the plaintiff was injured by the policy or custom.

On the facts, the Garretts' proof simply did not meet this standard.

Cellini v. *City of Sterling Heights*, 856 F.Supp. 1215 (E.D. Mich. 1994), is fact specific. The plaintiffs' proof in the case *sub judice* is distinguished because the I.A.B. did not act because Sheila never filed charges and set the I.A.B. investigatory processes in motion. Furthermore, the failure to act in Sheila's case did not satisfy the discrimination requirements set out in *Hynson* v. *City of Chester, supra*.

The Sixth Circuit's decision on the equal protection issue was correct. The Garretts present no issue that would call for this Court to exercise its discretionary review for further clarification.

III.

THERE IS NO BASIS FOR THE COURT TO FURTHER DEFINE ARBITRARY GOVERNMENT ACTION.

The Garretts' final argument is that the Court should use this matter to declare the boundaries of arbitrary government action. Petition for Writ of Certiorari, at 41-45. This case does not present the proper vehicle for such a declaration.

The Sixth Circuit's opinion was fact determinant. Its reasoning derived from the proof adduced at trial and the facts themselves limit any forays into unchartered areas of due process. *See, Collins* v. *City of Harker Heights, supra* at 1068. The Sixth Circuit's opinion rests on time tested Fourteenth Amendment standards and is in full agreement with the *DeShaney* holding. To extend substantive due process rights to situations where the State fails to protect another from private violence when it had no constitutional duty to protect, would create governmental liability for the failure to protect any victim from an assault by a private actor, without limit. The police, under our Constitution, are not the guarantors of citizens' freedom from *all* harm.

CONCLUSION

Respondents A.C. Gilless and Shelby County, Tennessee, request that the Petition for a Writ of Certiorari be denied because the case presents no issue appropriate for this Court's review, and because the Sixth Circuit's decision was not in error.

Respectfully submitted,

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